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Supreme Court, U.S.
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No. 03-366

In the

Supreme Court of the United States

NEW ORLEANS STEVEDORES AND SIGNAL MUTUAL ADMINISTRATION, LTD.,

Petitioners,

v.

PEGGY IBOS, Surviving Spouse of Bertrand Ibos, Jr., And DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent disagrees with the Question Presented as characterized by Petitioner. Instead, the Question Presented is more properly characterized as follows:

Whether a longshoreman and his survivor is entitled to temporary total disability benefits and survivor benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, from the plaintiff's last employer, when the last employer exposes claimant to asbestos while claimant is in the course and scope of his employment, claimant becomes symptomatic for the first time while employed by the last employer, and claimant is diagnosed with mesothelioma while still employed by the last employer.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals are:

NEW ORLEANS STEVEDORES (NOS), who was petitioner/cross-respondent in the court of appeals; petitioner/cross Respondent in the appeal to the U.S. Department of Labor, Benefits Review Board (BRB); and employer in the underlying claim for benefits in the U.S. Department of Labor, Office of Administrate Law Judges (ALJ) proceeding for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA).

SIGNAL MUTUAL ADMINISTRATION, LTD., who was petitioner/cross-respondent in the court of appeals; petitioner/cross Respondent in the appeal to the BDB; and the employer's carrier in the underlying ALJ LHWCA proceeding;

PEGGY IBOS, Surviving spouse of Bertrand Ibos, Jr, who was respondent/cross-petitioner in the court of appeals; respondent/cross-petitioner in the appeal to the BDB; and claimant in the LHWCA proceeding; and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, who was respondent in the court of appeals and the administrator of the LHWCA compensation program.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 1

RECORD CITATIONS 2

STATEMENT 2

ARGUMENTS FOR DENYING THE PETITION 12

A. The Court of Appeals' decision is correct and does not conflict with any decision of the this Court or of any other Courts of Appeals. Further review is not warranted 12

B. NOS is liable as claimant's last employer for exposing him to asbestos while in the course and scope of his employment, and during which employment, claimant first manifested symptoms of, and was diagnosed with mesothelioma. 12

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

AVONDALE INDUS., INC. v. DIR., OWCP [CUEVAS], 977 F.2D 186, 190 (5TH CIR.1992) 16

LUSTIG v. U.S. DEP'T OF LABOR, 881 F.2D 593, 596 (9TH CIR.1989) 16

NORFOLK SHIPBUILDING & DRYDOCK CORP. v. FAULK, 228 F.3D 378, 386-87 (4TH CIR. 2000), CERT. DENIED, 531 U.S. 1112, 121 S.CT. 855, 148 L.ED.2D 770 (2001) 16

TRAVELERS INS. CO. v. CARDILLO, 225 F.2D 137 (2D CIR. 1955), CERT. DENIED, 350 U.S. 913, 76 S.CT. 196, 100 L.ED. 800 (1955) 13, 14

VANS v. EIKEL, 346 U.S. 328, 74 S.CT. 88, 98 L.ED. 5 (1953) 13

Statutes

LHWCA, 33 U.S.C. 902 12

LHWCA, 33 U.S.C. 903 2

LHWCA, 33 U.S.C. 904 ..... 2, 12

OPINIONS BELOW

The opinion of the court of appeal, January 16, 2003, is reported at 317 F.2d 480. (Pet. App. 1-17). The order of the court of appeals denying petitioner's petition for rehearing en banc, June 10, 2003. (Pet. App. 75-76).

The decision of the Benefits Review Board, May 9, 2001, is reported at 35 Ben. Rev. Bd. Serv. 50. (Pet. App. 18-30).

The decision of the Administrative law judge, April 13, 200, is unreported. (Pet. App. 31-74).

JURISDICTION

The judgment of the court of appeal was entered on January 16, 2003, and a petition for rehearing en banc was denied on June 10, 2003. A petition for Writ of Certiorari was filed with this court on September 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS

The relevant portions of the LHWCA, 33 U.S.C. 901 *et seq.* provide:

> § 902. Definitions
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment or as

> naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

Section 3(a) of the LHWCA, 33 .S.C. § 903(a), provides:

> § 903. Coverage
>
> (a) Disability or death; injuries occurring upon navigable waters of United States.
>
> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading unloading, repairing, dismantling, or building a vessel).

Section 4 of the LHWCA, 33 U.S.C. § 904, provides:

> § 904. Liability for compensation.
>
> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In

the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

RECORD CITATIONS

Citation to the Appendix contained in the Petition are demarcates as "App. ___." Citation to the record in the ALJ proceeding are demarcated as follows: Claimant's Exhibits are demarcated as "CX - ___," as they are demarcated in the ALJ Decision and Order Awarding Benefits. Employer exhibits are similarly demarcated as "EX - ___." Citation to the trial transcript is demarcated as "TT, at ___."

STATEMENT

1. Statement of Facts.

Bertrand Ibos, Jr., worked as a longshoreman, longshore clerk and longshore superintendent in the Port of New Orleans since 1952. Prior to his employment with the NOS, Ibos was employed with Valor Stevedoring Company and Anchor Stevedoring

Company. Ibos' last employer was NOS. Everyone who knew Ibos, including Henry Flanagan, owner of NOS, described him as a "hands-on" employee. As a "hands-on" stevedore clerk and stevedore superintendent, throughout his work history Ibos was exposed to asbestos. (CX-6, pp. 9-10).

In August 1993, Ibos began working for NOS. Prior to his employment with NOS, Ibos had chest x-rays taken. The chest x-rays did not show any signs of mesothelioma cancer. (CX-31). Some of the equipment owned by Anchor, one of Ibos's previous employers, was sold to NOS. Ibos' employment with NOS was essentially the same as his employment with Anchor. (CX-6, p. 73). As a clerk and superintendent for NOS, Ibos went aboard approximately 338 vessels, the majority of which contained friable asbestos. One of the ships was the M/V LE PAIX. Prior to his death, Ibos reconstructed a list of ships that he worked on during his employment with NOS. (CX-6, pp. 89-90). Captain John C. Manders, licensed by the United States Coast Guard, researched the list of ships that Ibos identified. (CX-28). Of those vessels identified, over 125 of those vessels were Flag of Convenience vessels, vessels that are essentially unregulated. Many of the vessels were built before the United States banned the use of asbestos in ship construction. Henry Flanagan acknowledged the accuracy and reliability of the testimony of Ibos, Respondent, as well as those who worked with Ibos.

During his employment with NOS, Ibos was regularly required to report to Anchor's office and gear yard on Tchoupitoulas Street in New Orleans, Louisiana, where he was also exposed to crysotile asbestos. Mr. Ronald Macke, an employee of NOS from 1993-1994,

testified that Ibos was frequently sent to Anchor's enclosed gear yard where there was friable asbestos. (TT 72-73, 87-97). With respect to NOS' office and gear yard, Macke testified that there were broken tiles with exposed asbestos in the NOS' office. (TT 82-86), and that there were materials made of asbestos in NOS' gear yard. (TT 82-86). In connection with this case, Dr. Gordon Goldman tested Anchor's office and gear yard for asbestos. (CX-26). Subsequently, Dr. Goldman issued a report confirming the presence of crysotile asbestos in Anchor's office and gear yard. (CX-26).

In addition, Ibos went aboard vessels while he was employed with NOS. Ibos would also occasionally accompany the chief mate or engineer into the engine rooms of various vessels. One particular task Ibos performed as a NOS employee clearly demonstrates how Ibos was exposed to friable asbestos. In December 1993, Mr. Macke reviewed the cargo of the M/V LE PAIX and recognized that it contained asbestos cargo. (TT-75). The ALJ hearing the instant claim acknowledged that "NOS' representative, Flanagan, confirmed the hazardous nature of the asbestos cargo about th LE PAIX." (Pet. App. 62). The cargo was stored in Hold No. 3 of the ship, underneath cargo bound for Houston. (TT 75). Prior to the ship's arrival at the Port of New Orleans, asbestos was removed from the Hold No. 3 and placed into containers that were discharged from the ship upon its arrival in New Orleans. (CX-6, p. 77).

Ibos supervised the process of discharging the LE PAIX's containers. (Pet. App. 62). Mr. Macke confirmed that Ibos was present when asbestos contained on the MV LA PAIX was offloaded and stripped from the containers. (TT 75-81; CX-6, pp. 74-78). Ibos stood in the back of the hold for approximately one-half hour

talking with another employee as the asbestos cargo was aggressively stripped from the container. (CX-6, p. 77). The asbestos was not wrapped in any plastic or any other covering. (CX-6, p. 111). Ibos noted that as the asbestos cargo was unloaded, it became extremely dusty. (CX-6, p. 78). Later, Ibos went in to Hold No. 3, where the asbestos had been stored prior to its transfer to another container, to ensure that the hatch had been cleaned properly. (CX-6, pp. 79-80). Once again, Ibos noted that the hatch was extremely dusty. (CX-6, pp. 79-80).

In August of 1995, Ibos began to experience difficulty breathing and sought treatment from Dr. Harry Johnson. After his condition did not improve, Ibos returned to Dr. Johnson, who ordered x-rays of the thorax. These x-rays revealed a collapsed lung with fluid in the chest. Based on the x-rays, Johnson immediately admitted Ibos to Touro Infirmary, in New Orleans, for removal of three liters of bloody fluid. Thereafter, Dr. Issac Kirshbom performed an exploratory thoracotomy that revealed cancer of Ibos' lung and lining of his heart. (CX-12, 19, 20, 21, 22).

After this diagnosis, Ibos saw Dr. Salvador Caputto, an oncologist. Dr. Caputto confirmed that Ibos suffered form malignant mesothelioma and prescribed chemotherapy. (CX-12,19,20,21,22). Ibos sought a second opinion from Dr. William K. Murphy, Professor of Medicine and Deputy Chairman of the Department of Thoracic/Head and Neck Medical Oncology at the M.D. Anderson Cancer Center. (CX-13). Dr. Murphy confirmed that Ibos suffered from malignant mesothelioma. (CX-13).

Ibos' diagnosis of mesothelioma in August 1995, occurred while he was employed with NOS. (CX-6, pp. 90-91). NOS was Ibos' last employer in the Longshore industry. (CX-6, pp. 70-72). Decedent filed a timely claim under the LHWCA for compensation for total disability as a result of malignant mesothelioma, cancer of the lung, caused by exposure to asbestos from his work.[1] In October 1995, Ibos was forced to leave his employment with NOS as a result of complications from the mesothelioma. On February 14, 1996, Ibos died as a result of this condition.

2. Lower Court Proceedings.

The hearing on the merits of Ibos' LHWCA claim began on November 9, 1999 before ALJ Kennington. Initially, NOS denied that Ibos suffered from occupational mesothelioma. Later, NOS conceded that Ibos suffered from mesothelioma, but asserted that any exposure to asbestos that Ibos incurred during his employment with NOS did not cause injury to Ibos. An abundance of evidence was submitted to the contrary.

Dr. Pamela Martin, a board certified pathologist, testified that considering the aggressive nature of mesothelioma, the tumor found in Ibos' lungs probably

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[1] In addition to NOS, Ibos filed a claim against Valor and Anchor, with whom he settled his case, in accordance with 33 U.S.C. § 908 (i). NOS refused to consider a settlement agreement under the LHWCA. In the trial and appeal of this matter, one of the issues presented was whether NOS was entitled to a credit for the amount of the settlement agreements with Valor and Anchor. The Fifth Circuit finally resolved the question in holding that Valor and Anchor were not entitled to a credit. That ruling is not before the court in the instant Petition for Certiorari.

developed during Ibos' employment with NOS. (CX-31). Dr. Martin testified that once the asbestos fibers are inhaled, a cellular reaction occurs. The asbestos fibers attach to the tissues of the lung and cause cellular injury. Once a person has reached the cumulative exposure to asbestos, any additional exposure to asbestos causes additional injury at a subclinically detectable level. (CX-31). Dr. Martin confirmed that Ibos's last injurious exposure to asbestos was during his employment with the NOS. (CX-31, pp. 22-23, 30). She then noted that asbestos exposure to Ibos while employed at NOS may not have changed the course of the disease, but that additional asbestos exposures causes harm to immune cells and lung tissue at a cellular level. (CX-31). Dr. Martin reported that Ibos suffered from malignant neoplasm, favor mesothelioma, which was the cause of his death, (CX-31, p. 7), and confirmed that exposure at NOS harmed immune cells and lung tissue.

Particularly convincing was the fact that Ibos had chest x-rays in August and December of 1994 prior to his employment with NOS, which showed no signs of the mesothelioma tumor. (CX-31). Dr. Martin testified that the disease is so aggressive that the tumor, more likely than not, developed during the Ibos's employment with NOS. (CX-31). Dr. Martin stated that the latency period of mesothelioma is probably twenty or thirty years; however, any subsequent inhalation of asbestos into the lung can cause harm on a cellular level. (CX-31, pp. 17-19). She also reiterated that any exposure to friable asbestos that Ibos received during his employment at NOS caused injury to the body on a cellular level even though it may not have materially changed the course of the disease. (CX-31, pp. 24-29).

Dr. Jerrold L. Abraham, an authority in asbestos and mesothelioma at the Health Science Center at Syracuse and a medical consultant with NOS, confirmed that Ibos suffered from malignant mesothelioma. (CX-16). He also reported that Ibos had a strong occupational history of asbestos exposure, the most probable cause of his malignant mesothelioma. (CX-16). After evaluating a sample of Ibos' lung tissue, Dr. Abraham determined that the dimensions of the crysotile and tremolite are indicative of occupational exposure. (CX-17). He also confirmed in a supplemental report that "Mr. Ibos' exposure to asbestos fibers of both commercial amphibole and crysotile types, in the size ranges known to be associated with mesothelioma risks." (CX-17).

Mr. Alan Jurisch, an expert board certified industrial hygienist, also testified in conformity with Dr. Martin and Dr. Abraham, that exposure to friable asbestos that Ibos incurred while employed by NOS caused severe damages to the lung tissue on a cellular level. (CX-30, p. 40; CX-32, pp. 36-38). Even though the latency period for the disease was approximately twenty years, Mr. Jurisch confirmed that any additional exposure continues to cause harm to the cells of the body. (CX-30, p. 39). Mr. Jurisich acknowledged the aggressive nature of the disease, and testified that continuous asbestos exposure systematically results in injury to portions of the immune system and lung area. (CX-32, pp. 36-40). Mr. Jurisich testified that Ibos' exposure to asbestos during his employment with NOS, such as his exposure to friable asbestos on the M/V LE PAIX, caused substantial injuries to the cells and tissues of Ibos' lungs. (CX-30). Dr. Howard Sandler testified on NOS' behalf, and his opinion is contained in the Statement of the Case in the Petition. (Pet. at 6-7).

In considering this compelling medical testimony and testimony of those familiar with Ibos' employment practices, the ALJ ruled that the sole remaining employer, NOS, was the liable one or the last employer to expose Mr. Ibos to the conditions responsible for injury pursuant to the "last employer rule." (Pet. App. 31-74).

As noted by the Fifth Circuit Court of Appeal in this review of this matter:

> ... we find there is substantial evidence in the record as a whole to support the ALJ's finding that Decedent [Ibos] died of mesothelioma resulting from his overall occupational exposure to asbestos. *** The ALJ concluded that the "[m]edical evidence presented by Drs. Caputto, Martin, Abraham, M.D. Anderson, and Touro demonstrated that Claimant suffered from malignant mesothelioma related to occupational asbestos exposure." **The only testimony NOS presented to rebut the evidence that Claimant suffered from mesothelioma was that of Dr. Sandler, who testified that Claimant did not clearly suffer from mesothelioma. However, the ALJ was not impressed by Dr. Sandler's opinion because Dr. Sandler is not a pathologist and because Dr. Sandler "did not take into consideration the overwhelming evidence of the pathologists who provided credible testimony and medical evidence in this case."**

317 F.3d at 486, and n.6 (emphasis added).

NOS filed a petition with the BRB appealing the decision of the ALJ.[2] The BRB affirmed the ALJ's ruling in whole. (Pet. App. 18-30).

On June 21, 2001, NOS and Signal appealed the ruling of the BRB to the Fifth Circuit Court of Appeals asserting that the BRB had erroneously found them liable in whole for the injuries that Ibos had suffered as a result of asbestos exposure throughout his employment in the longshore industry.[3] The Court of Appeals Affirmed the ruling holding NOS liable.[4] (Pet. App. 1-17). The Court of Appeal denied NOS' and Signal's petition for rehearing on June 10, 2003. (Pet. App. 75-76).

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[2] Respondent filed a cross petition for review with BRB, appealing the part of the ALJ decision that granted NOS a credit for settlement proceeds paid by two of Ibos' previous employers prior to the ALJ hearing. As noted, that issue is not before the Court.

[3] On June 29, 2001, Respondent filed a cross-petition to appeal the BRB's decision to affirm the ALJ's granting NOS a credit for the amount of settlement.

[4] The Court of Appeal reversed the part of the ruling allowing a reduction of the amount of liability based upon claimants settlement with other employers.

ARGUMENTS FOR DENYING THE PETITION

A. **The Court of Appeals' decision is correct and does not conflict with any decision of the this Court or of any other Courts of Appeals. Further review is not warranted.**

The Court of Appeals opinion does not create "bad policy."

The Court of Appeal opinion does not conflict with any other Circuit Court of Appeals opinion, or with any opinion of this Honorable Court.

B. **NOS is liable as claimant's last employer for exposing him to asbestos while in the course and scope of his employment, and during which employment, claimant first manifested symptoms of, and was diagnosed with mesothelioma.**

There are two prongs to the statutory definition of what constitutes a compensable "injury" under the LHWCA: "accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." LHWCA § 2 (2), 33 U.S.C. § 902(2). The Act was intended to put in to affect a type of "workers' compensation" scheme in the context of maritime/longshore employment. section 904 specifies that "every employer" is liable for compensation payable to its employee, "irrespective of fault as a cause for the injury." 33 U.S.C. 904 (a),(b). There is nothing in the statutory definition that ties a compensable injury to a particular employer, so long as it can be tied to covered

maritime employment." The statute only requires that the injury occur while in the course of employment, and that the conditions of the employment be of a kind that produces the occupational disease. It is well settled that the Act must be construed liberally in favor of the claimant. *Vans v. Eikel*, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953).

With respect to workplace injuries that have long-latency periods, such as silicosis, asbestosis or mesothelioma, an employee may be exposed to a harmful agent or stimuli while under the employ of several consecutive employers, as the experts in this case agreed. This is particularly so in maritime employment, where a worker such as Ibos can work for several different consecutive employers; and asbestos-related diseases, which may not manifest themselves for long period of time after the exposure to asbestos fibers. In *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955), the Second Circuit held, as a matter of legislative interpretation, when enacting this section of the LHWCA Congress intended that full liability should rest on the "last exposing employer," regardless of the absence of actual causal contribution by the final exposure. *Cardillo*, 225 F.2d at 145. As stated by the Fifth Circuit in deciding the instant appeal:

> ... Pursuant to the *Cardillo* "last exposure rule", the employer "during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be

liable for the full amount of the award."

317 F.3d at 484, n.2 (quoting from *Cardillo*, *supra*). In a well reasoned opinion, the Fifth Circuit followed the *Cardillo* rule, below, and applied it to this case.[5] The Fifth Circuit properly found that Ibos had made a *prima facia* showing of liability under the Act.

In considering the standard to be applied in the rebuttal of a claim, the Court of Appeal held that the

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[5] The decision of the Fifth Circuit to follow and apply *Cardillo* was not arbitrary. The Fifth Circuit looked into the history of the enactment of the LHWCA, citing particularly to one congressional hearing preceding during the LHWCA's passage, were an "employer" representative suggested that the LHWCA should include within this section a provision limiting an employee's total recovery against a particular employer to the same ratio as the extent of the harm done during the period worked for that employer bore to the total disability. 317 F.2d at 484-85 (citing to a Hearing before the House Judiciary Committee on H.R. 9498, 69th Cong., 1st Sess. 72 (1926)). Those involved in the hearing accepted the employer representative's complaint, acknowledging that, "without such a provision capping liability, a "last employer" would be liable for the full amount of compensation, even if the duration of the injured employer's employment was so brief that the injury would probably not be medically attributable at all to that "last employment." *Id.* Nevertheless, the suggested provision was not adopted by Congress into the LHWCA. Based upon this refusal to incorporate an express suggestion from the committee the Fifth Circuit, as did the Second Circuit in *Cardillo*, inferred that "Congress declined to adopt the suggested provision because it realized the administrative difficulties certain to arise if such a provision were incorporated into this section of the LHWCA. *Id.* at 484-485; *Cardillo*, 225 F.2d at 145. "As *Cardillo* recognized, '[t]he nature of occupational diseases ... make[s] it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences." *Id.*

BRB had erred by applying the wrong standard. The BRB apparently applied the very test now espoused by the Petitioner; that in an occupational disease claim brought under the LHWCA, an employer can rebut an employee's prima facie case if that employer establishes that the claimant's exposure with that employer "did not have the potential to cause the disease." 317 F.3d at 485. The Court of Appeal held:

> ... Contrary to the BRB's reasoning, the issue on rebuttal is not whether an employer can prove that a particular exposure with a particular employer did not have the potential to cause the disease. Neither is the issue on rebuttal whether an employer can prove that there is no evidence of a true causal link between a particular exposure and the development of the employee's disease. Rather, we have held that, after it is determined that an employee has made a *prima facie* case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. ... Thus, in the present claim, the only issue the ALJ was to consider in its rebuttal inquiry was whether NOS proved that exposure to asbestos did not cause Decedent's mesothelioma, regardless of whether the exposure Decedent experienced at NOS

> either caused or had the potential to cause Decedent's mesothelioma.

Id.[6] (citing to *Avondale Indus., Inc. v. Dir., OWCP* [*Cuevas*], 977 F.2d 186, 190 (5th Cir.1992)). In *Cuevas*, the Fifth Circuit had held:

> ... "[A] claimant does not have to prove that his employer is liable. Once he has demonstrated a prima facie entitlement to benefits by showing that he 'sustained physical harm and that conditions existed at work which could have caused the harm,' he has established that his 'exposure to injurious stimuli during employment covered under the [LHWCA], and there exists a compensable claim. Employer can then rebut this presumption by showing that exposure to injurious stimuli did not cause the harm ... [or] that employee was exposed to injurious stimuli while performing work covered under the [LHWCA] for a subsequent employer.' "

977 F.2d at 190. *See also, Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 386-87 (4th Cir. 2000), *cert. denied*, 531 U.S. 1112, 121 S.Ct. 855, 148 L.Ed.2d 770 (2001) (rejecting the last employer's latency argument and holding the last employer liable for the full amount of the claim); *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 596 (9th Cir.1989) (reasoning that the latency argument "suggests an unwarranted change of

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[6] Curiously, when applying the "causation" test urged by Petitioner, the BRB found that NOS was indeed liable to Ibos under the Act.

the 'last employer rule' set forth in [*Cardillo*] which change we decline to adopt.").[7] Applying these cases, and rejecting NOS's argument to insert a "medical causation" prong into the test, the Fifth Circuit upheld the decisions of the ALJ and BRB which had ultimately found that NOS is liable to Ibos, since it was his last employer; he was exposed to the "injurious stimuli" of asbestos while employed at NOS; and, his mesothelioma first manifested while he was employed by NOS.[8]

The Fifth Circuit correctly applied *Cardillo* and *Cuevas*, which are good law. While petitioner does its best to portray itself as an "innocent" employer (a term repeated no less than three times in the petition), who is "without responsibility," it cannot escape the fact that it exposed Ibos to asbestos during the course of his employment with NOS, regardless of how "trivial," (Pet.

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[7] The Courts have applied the "last injuries exposure" rule, and only required "some exposure of a kind that could have cause the disease" to impose liability" Fed. Resp. Brief, at § 1.a. (citing to 9 Arthur Larson, Larson's Workers' Compensation Law, §153.02[7][a], at 153-18 (2003); *Wood v. Harry Harmon Insulation*, 511 So.2d 690, 692-693 (Fla. App. 1987), *review denied*, 520 So.2d 584 (Fla. 1988); *Union Carbide Corp. v. Industrial Comm'n*, 581 P.2d 734, 737 (Colo. 1978); *McCormick v. United Nuclear Corp.*, 557 P.2d 589, 594 (N.M. App.), *cert. denied*, 558 P.2d 620 (N.M. 1976); *Osteen v. A.C. & S., Inc.*, 307 N.W. 2d 514, 520 (Neb. 1981); *Caudle-Hyatt, Inc. v. Mixon*, 260 S.E.1d 193, 196 (Va. 1979).").

[8] Although the BRB had applied the wrong standard, the Court of Appeal found that there was "substantial evidence in the record as a whole to support the ALJ's finding that Decedent died of mesothelioma resulting from his overall occupational exposure to asbestos." 977 F.3d at 486. Specifically, the Court noted that "NOS had an opportunity to present specific, comprehensive medical evidence disproving that Decedent's mesothelioma was caused by his exposure to any asbestos, but failed to do so." *Id.*

15), the Petitioner may allege the exposure to be. The ALJ, for one, was "impressed" by the testimony regarding the LE PAIX incident and the extent of friable asbestos released, and "also impressed" by the uncontradicted testimony regarding asbestos at the gear yard. (Pet. App. 61-63). To avoid liability under the Act he need only refrain from exposing an employee to an "injurious stimuli," such as asbestos.

In this case, NOS did expose its employer, Ibos, to asbestos, and the exposure was not "trivial." Prior to his employment with NOS, Ibos' x-rays were clear. After Ibos became symptomatic during his employment with NOS, x-rays revealed a collapsed lung with fluid in the chest. Thereafter, an exploratory thoracotomy that revealed cancer of Ibos's lung and lining of his heart. (CX-12, 19, 20, 21, 22). Dr. Caputto confirmed that Ibos suffered form malignant mesothelioma and prescribed chemotherapy, (CX-12,19, 20, 21, 22), and a second opinion from Dr. Murphy confirmed that Ibos suffered from malignant mesothelioma. (CX-13).

Ibos was exposed to asbestos while at NOS during his employment with NOS. He was exposed to asbestos at NOS' office and gear yard, (TT 72-73, 82-97), which tested positive for the presence of crysotile asbestos in Anchor's office and gear yard. (CX-26). He was also exposed to asbestos aboard various vessels, including the notorious event in the M/V LE PAIX, wherein he supervised the removal of friable asbestos in containers that were not sealed, wrapped or otherwise made to retain the asbestos fibers therein. (Pet. App. 62, 65); (TT-75); (CX-6, p. 77, 11). It was confirmed that there was asbestos in the holds of the LE PAIX, and Ibos noted that as the asbestos was unloaded, it became very dusty. (CX-6, p. 78). Later, Ibos went in to Hold No. 3,

where the asbestos had been stored prior to its transfer to another container, to ensure that the hatch had been cleaned properly. (CX-6, pp. 79-80). Once again, Ibos noted that the hatch was extremely dusty. (CX-6, pp. 79-80).

No less than three distinguished experts have testified that Ibos was harmed by exposure to asbestos during his occupation in the maritime industry. Dr. Martin testified that Ibos was injured by asbestos exposure while employed by NOS, (CX-31); Dr. Abraham testified that Ibos had a strong occupational history of asbestos exposure and was injured by asbestos fibers; (CX-16); and Mr. Jurich testified that exposure to asbestos fibers at NOS had caused severe damage to Ibos' lung tissue on a cellular level. (CX-30).

Finally, Ibos' diagnosis of mesothelioma, in August 1995, occurred while he was employed with NOS, (CX-6, pp. 90-91), and NOS was Ibos's last employer in the Longshore industry. (CX-6, pp. 70-72). Claimant has fully satisfied his burden under the LHWCA and the rule annunciated in *Cardillo*, and *Cuevas*, and the lower courts were eminently correct in finding that NOS is liable to claimant. In fact, every lower court which has reviewed the "substantial evidence in the record" 317 F.3d at 486, had held NOS liable to claimant for exposing him to asbestos. (Pet. App. 75) (Fifth Circuit Court of Appeals Opinion on Rehearing); (Pet. App. 1-17) (Fifth Circuit Court of Appeals Opinion); (Pet. App. 18-30) (BRB Opinion) (Pet. App. 31-74) (ALJ Opinion).

Petitioner has had four bites at the proverbial "apple," but has been unable to convince any court that NOS could not "even theoretically," (Pet. 15), have

caused Ibos to contract mesothelioma. While being beside the point (this is not the legal standard to be employed), the argument is wrong. Instead the lower courts relied on the "substantial [medical] evidence" to find liability in this case, even finding that petitioner's own medical evidence with regard to the long-latency of such diseases supported application of the "last exposure" rule. 317 F.3d at n 7.

This decisions of the lower courts with respect to liability are correct. The Fifth Circuit's opinion is well reasoned and in accordance with guiding jurisprudence. This Honorable Court should deny the instant Petition for Certiorari.

CONCLUSION

Petitioner has failed to present any compelling reason for granting a writ of certiorari.

Each and every tribunal that has heard or reviewed this case has found that benefits are due under the LHWCA. The Court of Appeals was correct in upholding the decisions of the BRB and ALJ with respect to their findings that benefits are due. Petitioner has failed to raise any important question of federal law, or any divergent circuit court opinions which should be reconciled by this Court. Finally, the Court of Appeals did not decide the case in any way that conflicts with relevant decision of this Honorable Court. The Court should, therefore, deny the Petition for Writ of Certiorari.